IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.01.2007

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

W.P.No.27951 of 2006

M/s.Sivananda Steels Limited
No.18,19,20, Industrial Estate,
Ambattur, Chennai 600 058
Rep.by its Managing Director
P.Venkatesan

... Petitioner

Vs.

1. The Recovery Officer,
Employees State Insurance Corporation,
143, Sterling Road,
Nungambakkam,
Chennai 600 034.

2. The Dhanalakshmi Bank Ltd.,
No.34, CSM Plaza,
Venkatakrishna Road,
Mandaveli,
Chennai 600 028.

... Respondents

PRAYER: This writ petition is filed under Article 226 of the Constitution of India to issue a writ of mandamus, calling for the records in respect of the impugned notice issued by the 1st respondent on 22.08.2006 in Ref.TN/RECY/ 45(G)-51-9282 to the 2nd respondent, quash the same directing the 1st respondent not to take the coercive action to realize alleged interest without consent of the BIFR.

For Petitioner : Mr.C.S.Dhanasekaran
For Respondent No.1: Mr.A.Paramasivam
R2 : NA

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O R D E R

The writ petition is filed challenging the notice issued by the first respondent Employees State Insurance Corporation, dated 22.08.2006 thereby directing the second respondent to pay an amount of Rs.9,40,146/- towards interest and the said notice is purported to be issued under Section 45(g) of the Employees State Insurance Act, 1948. This notice is challenged by the petitioner on the ground that

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the petitioner/company was referred to the Board for Industrial and Financial Reconstruction (BIFR) and a scheme was sanctioned on 09.08.2005. As per the scheme, the provision relating to Employees State Insurance and Employees Provident Fund, which was agreed upon between the parties, was as follows:

> "H.ESIC/Employees Provident Fund:
>
> (i) To grant waiver of penal interest and other charges as on the cut-off date and during the rehabilitation period.
>
> (ii) To accept the principal outstanding (ESIC-Rs.12.64 lakh and EPF-Rs.28.53 Lakh) as on cut-off date over a period of three years from April 1, 2004."

2. According to the petitioner, pursuant to the said sanctioned scheme the petitioner has paid the entire amount of Rs.12.64 lakhs and therefore, there was no due in respect of the said payment. Now the impugned order is passed claiming another amount of Rs.9,40,146/- being the amount of interest. According to the petitioner, when once pursuant to the scheme sanctioned, the agreed amount of E.S.I. contribution of Rs.12.64 lakhs was already paid and when the clause also specifically provides waiver of penal interest and other charges, it is not open to the first respondent to claim interest now. According to the petitioner, by the impugned order the first respondent has frozen the accounts of the petitioner lying in the second respondent, which affects the implementation of the scheme as such and therefore, the present Writ Petition is filed.

3. On the other hand, the first respondent, who has filed the counter affidavit would submit that while it is true that the Board for Industrial and Financial Reconstruction (BIFR) directed as per the sanctioned scheme to pay the amount of Rs.12.64 lakhs as outstanding due to Employees State Insurance Corporation, what is now sought to be recovered under the impugned order is only an interest due from the petitioner in respect of the belated payment of contribution charged as per section 39(5) of the Employees State Insurance Act r/w Regulation 31 and 31(a) (General Regulation, 1950). According to the first respondent, what was waived was only penal interest and other charges, which does not include the normal interest payable in respect of belated payments. According to the first respondent, the right under Section 39(5) of the E.S.I.Act, which relates to payment of simple interest is different from the liability under Section 85(b) of the Act, which relates to a recovery of damages. What is contemplated in the sanctioned scheme is only in respect of the penal interest, which are otherwise damages as per Section 85(b) of the Employees State Insurance Act.

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4. I have heard the learned counsel for the petitioner as also the learned counsel appearing for the first respondent.

5. It is admitted that there has been a sanctioned scheme in this present case and as I have elicited above, in respect of the payment of Employees State Insurance contribution, there are 2 clauses relation to

1) the waiver of penal interest and other charges
2) the payment of a lumpsum

which amount admittedly has been paid. The contentions of the learned counsel for the first respondent is that it is only the penal interest which should be equated to that of damages under Section 85 (b) that has been waived and what is claimed under the present proceedings issued under Section 45(g) of the Employees State Insurance Act, is only simple interest, as contemplated under Section 39(5) of the Act. Section 85(B), which contemplates powers to recover damages states as follows:

> "85-B. Power of recover damages.- (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover (from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations):
>
> Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard:
>
> (Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations.)
>
> (2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue (or under section 45-C to section 45-I)."

Similarly, Section 39(5), states as follows:

> "39(5)(a) If any contribution payable under this Act is

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not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent annum or at such higher rate as may be specified in the regulations till the date of its actual payment:

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charges by any scheduled bank.

(b) Any interest recoverable under clause (a) may be recovered as an arrear of land revenue or under section 45-C to section 45-I."

6. In respect of the amounts either under Section 39(5) or under Section 85(b), the Employees State Insurance Corporation is entitled to recover the same by coercive process under Section 45(c) to 45(i) of the Act. However, it remains a fact that in respect of recovery in both sections, it is due to the failure on the part of the employer from making contribution of any amount payable under the Act. Of course, in one case it is called interest and in another case it is called damages.

7. Under the provisions of the Sick Industrial Companies (Special Provisions Act, 1985), the preparation and sanction of schemes as contemplated under Section 18, contemplates a clause that on and from the date of coming into operation of sanctioned scheme it is binding on the Sick Industrial Company and the transferee company. That apart under Section 18(9) which enables the board to clarify any difficulty, which may be necessary. Section 18(9) states as follows:

"18(9) If any difficulty arises in giving effect to the provisions of the sanctioned scheme the Board may, on the recommendation of the operating agency (or otherwise), by order do anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing difficulty"

8. Further, Section 18(12) states "the board may monitor periodically the implementation of the sanctioned scheme". In the light of the above provision, the contention raised on behalf of the learned counsel for the first respondent that the petitioner company has already been discharged from the purview of Sick Industrial Company Act, and therefore, the board seizes to have any control over the implementation of the scheme, is to be considered. As per the order of Board for Industrial and Financial Reconstruction (BIFR) stated to be on 18.04.2006, the operative portion runs as follows:

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"In view of the fact that the sanctioned scheme had been implemented substantially with settlement of dues of all secured creditors and VRS to all the workers who had opted for the same and net worth having become positive, the board hereby discharges the company from the purview of SICA with a proviso that the company shall continue to implement the scheme in letter and spirit and residual issues as per the SS shall be complied with within the time schedule fixed therein."

9. A reading of the said order shows that even though the company is stated to have been discharged from the purview of Sick Industrial Company, there is a proviso stating that the company shall continue to implement the scheme in letter and sprit and it is in this regard by virtue of Section 18(12) of the Act, the board has got a right to monitor in respect of implementation of the sanctioned scheme. Therefore, it cannot be said as if the board seizes to have any control over the affairs of the petitioner company.

10. Now that it is the first respondent, who is raising the issue that, what is sought to be recovered by coercive proceedings under the impugned order is only an interest under Section 39(5)(a) of the Employees State Insurance Act, which was not barred by the sanctioned scheme, and according to the learned counsel for the first respondent, what was barred is only the penal interest under Section 85(b) of the Employees State Insurance Act, which in fact is called under the said provision as damages. It is only for the first respondent to seek appropriate clarification from Board for Industrial and Financial Reconstruction (BIFR) and that cannot be the ground for taking coercive action against the petitioner under Section 45(g) of the Act. It is in this regard relevant to point out that Section 22(1) of the Sick Industrial Companies Act, bars the legal proceedings as well as execution and distress proceedings, even in cases where the sanctioned scheme under implementation Section 22 (1) of the Sick Industrial Companies which runs as follows:

"22(1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the

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appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company) shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the appellate authority."

11. The scope of Section 22(1) came to be decided in Gram Panchayat Vs. Shree Vallabh Glass Works Ltd., reported in AIR 1990 SC 1017, wherein the Supreme Court has held that Section 22(1) of Sick Industrial Companies Act, automatically suspends the following proceedings namely:

1) winding up of the Industrial company
2) proceedings for execution, distress or the like against the properties against the Sick Industrial Company and
3) proceedings for the appointment of receiver

Further stating that such proceeding may continue against the Sick Industrial Company with the consent of the board or the appellate authority as may be. While dealing with the recovery of arrears of sales taxes, the Supreme Court again reiterated the same in TATA Davy Ltd., Vs. State of Orissa reported in AIR 1998 SC 2298.

12. The Hon'ble Full Bench of this Court in the judgement rendered in Gowri Spinning Mills (P) Ltd., Rep. by the Managing Director, Thokkampatti, Dharmapuri. Vs. Assistant Provident Fund Commissioner, Sub-Regional Office, Salem reported in 2006(5) CTC 1, by referring to the said judgements of the Supreme Court has held that such coercive proceedings cannot be taken. Therefore, it is clear that either where the scheme is under the formation stage or where the scheme has been sanctioned, till the same is completely implemented, Section 22(1) of the Sick Industrial Companies Act, suspends all sorts of distress proceedings, which include the proceedings initiated by the first respondent in the present case under the impugned notice issued under Section 45(g) of the Employees State Insurance Act.

13. In view of the same, the impugned notice by the first respondent is set aside, however, giving liberty to the first respondent to approach the Board for Industrial and Financial Reconstruction (BIFR) under Section 18(9) of the Sick Industrial Companies Act, for clarification of any difficulty regarding the interest, whether the same is liable to be paid or not under the sanctioned scheme .

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The Writ Petition stands allowed in the above terms. No Costs. Consequently, the connected W.P.M.P.is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

nbj

1. The Recovery Officer,
Employees State Insurance Corporation,
143, Sterling Road,
Nungambakkam,
Chennai 600 034.

+3ccs to Mr.C.S.Dhanasekaran, Advocate Sr 3640
+1cc to Mr.A.Paramasivam, Advocate Sr 3636

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